

1990

# Ralph Tolman v. Salt Lake County Attorney : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE COURT OF APPEALS  
STATE OF UTAH

\* \* \* \* \*

RALPH TOLMAN,	)	BRIEF OF RESPONDENT
Appellant,	)	SALT LAKE COUNTY
vs.	)	Case No. 900112-CA
SALT LAKE COUNTY ATTORNEY,	)	Priority No. 15
Respondent.	)	

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JUDGE FRANK G. NOEL

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FILED

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COURT OF APPEALS

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IN THE COURT OF APPEALS  
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1. PARTIES

All of the parties are named in the caption.

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#### 4. JURISDICTION

This Court has jurisdiction pursuant to Section 78-2a-3(2)(a)(b).

#### 5. NATURE OF PROCEEDINGS

The Appellant's appeal is from an order from the Third District Court affirming the decision of the Salt Lake County Career Service Council termination of the Appellant's employment with Salt Lake County.

#### 6. THE ISSUES PRESENTED ON APPEAL

- a. Whether Rule 65B(b)(2) U.R.C.P., governs the standard of review.
- b. Whether the hearing held before the Career Service Council comported with minimum due process requirement.
- c. Whether this Court should set aside the Decision of the Salt Lake County Career Service Council.
- d. Whether the test set forth in Vetterli v. Civil Service Commission of Salt Lake City, is applicable to the above-entitled case.
- e. Can prior misconduct of the Appellant be used by his employer to determine the severity of a penalty?

#### 7. STATEMENT OF THE CASE

This case involves an appeal from an order denying the Appellant's Petition for Extraordinary Relief brought pursuant to

Rule 65B(b)(2), U.R.C.P. The following facts were found by the Salt Lake County Career Service Council in their written Findings of Fact, Conclusions of Law, and Decision, dated 3rd day of December, 1986. (See Addendum 2).

1. Ralph Tolman was hired from the Salt Lake County Sheriff's Department as an investigator for the Salt Lake County Attorney's Office. (Transcript P.641, L.21-25).

2. The responsibilities and duties of an investigator of the Salt Lake County Attorney's Office were the same responsibilities and duties as a law enforcement officer for the State of Utah and required peace officer certification. (Transcript P.750, L.23-25, P.751, L.1-16, P.641, L.16-22, i.e., Section 77-1a-1(1)(a)(vi) U.C.A., 1953, as amended).

3. On June 5, 1981, at 12:10 a.m., Tropper Terry McKinnon, of the Utah Highway Patrol stopped a blue AMC Hornet driven by Ralph Tolman. (Transcript P.77, L.1-20, P.78, L.22-24).

4. Mr. Tolman was driving a Salt Lake County Attorney vehicle which had a police radio and he informed Trooper McKinnon that he had a gun in the glove box. (Transcript P.78, L2-4, 20-24, P.86, L.24-25).

5. Trooper McKinnon smelled an odor of alcohol on Tolman, determined that he was driving under the influence or impaired and arrested him. (Transcript P.79, L.4-5, P.81, L.22-25, P.82, L.2-4).

6. Mr. Tolman was transported to the Murray City P.D. Department where a breathalyzer test was administered. (Transcript P.82, L.2-4, P.83, L.13-14, P.84, L.12-25).

7. The results of the breathalyzer test showed a blood alcohol level of .11%. (Transcript P.85, L.6).

8. Tolman was released to Sgt. Granes while Trooper McKinnon was concerned with what to do with the County Attorney's car. (Transcript P.85, L.9-10, P.86, L.24-25, P.87, L.1-4).

9. Ralph Tolman entered a plea in the above matter to Reckless Driving. (Transcript P.79 and 80).

10. Don Sawaya, Chief Deputy of the Salt Lake County Attorney's Office, verbally warned Mr. Tolman that any further repetition would result in his termination. (Transcript P.92, L.15-21, P.93, L.1-10, L.16-24).

11. As disciplinary action, Mr. Tolman was given five (5) days off without pay, however he was allowed to forfeit five compensatory days. (Transcript P.95, P.292, L.4-24, P. 293, L.1-7).

12. Mr. Tolman did not challenge the fact that he had been arrested for a D.U.I. by Trooper McKinnon and he admitted that he had plead guilty to Reckless Driving. (Transcript P. 661, L.18-25, P.662, L.1-4).

13. In 1983 or 1984, Mr. Tolman, was observed exiting the Sage Lounge by Officers Tom Cowan and Sgt. Tim Start of the

Midvale Police Department. (Transcript P.111, L. 21-24, P.111, L.12-20, P.744, L.6-7).

14. Tolman staggered or walked very unsteadily to his car and got in. The officers observed him start his car and the brake lights came on. (Transcript P.112, L.7-21, P.112, L.23-25, P.744, L.11-12 and L.24-25).

15. Tolman's vehicle was blocked by Sgt. Start. Both officers stated they smelled an odor of alcohol on Tolman and concluded that he was under the influence of an intoxicant. (Transcript P.113, L.21-25, P.114, L.3-10, P.119, L.6-7, P.745, L.4-5, P.745, L22-25).

16. Tolman was belligerent and irrate and did not want the officers to find him an alternate way home. (Transcript P.114, L.18-24, P.129, L.7-12).

17. Sgt. Start was reluctant to arrest Tolman because of his position as a investigator for the Salt Lake County Attorney Office. (Transcript P.122, L.2-4, P.744, L.13-18, P.746, L.17-18).

18. Tolman did not contest that he was at the Sage Lounge or that he had been drinking, but only challenged the officers' version of whether or not he entered his vehicle and started it. (Transcript P.688).

19. The Salt Lake County Career Service Council chose not to accept the version of Tolman and his ex-wife, Linda, but

rather accepted the testimony of the officers as being more credible.

20. On August 18, 1986, at 17th South and 11th East, Ralph Tolman was arrested for driving under the influence of alcohol by Salt Lake City Police Officers Muniz and Hendenstrom. (Transcript P.131, L.24-25, P.132, L.10-11, P.132, L.5-8, P.133, L.25).

21. Tolman identified himself with his driver's license and his Salt Lake County Attorney identification card. (Transcript P.134, L.10-11).

22. His eyes were blood shot, he smelled of alcohol and both officers were of the opinion that he was under the influence of alcohol. (Transcript P.134, L.22-24, P.140, L.21-24, P.154, L.1-2).

23. Officer Hendenstrom administered five field sobriety tests, they were: (1) one leg stand; (2) nine step walk; (3) finger count; (4) modify attention; and (5) eye gage test. (Transcript P.151, P.152, P.153, L.16-18). Hendenstrom asked Tolman why he was trying to tell him where he was employed. (Transcript P.154, L.19-20). While being transported to the Salt Lake County Jail, Tolman told Officer Hendenstrom that he would probably lose his job. (Transcript P.156, L.18-19).

24. Officer Hendenstrom administered the Intoxilizer machine test to Tolman and received a result of .152%, which is almost twice the legal limit. (Transcript P.157-58, P.159, L.8-14).

25. The Salt Lake County Career Service Council found that this incident occurred while Mr. Tolman was off-duty. (Transcript P.132, L.4-18).

26. Mr. Tolman admitted that he plead guilty to a alcohol-related offense of reckless driving which arose from this event. (Transcript P.717, L.5-6).

27. On June 10, 1986, in the evening hours, Ralph Tolman went to the home of Margo Bergvall, with whom he had previously lived. (Transcript P.692, L.14-20, P.173, L.13-17, P.174 and 175).

28. Bergvall and Tolman's relationship had ended in May of 1986. (Transcript P.171, L.4-6).

29. On June 10, Bergvall and a fellow co-worker, Dave Nielsen had been to an office party at Aggies' and had gone to Bergvall's house. (Transcript P.173, L.13-24).

30. Both Bergvall and Nielsen got into her hot tub, and ... subsequently, Tolman found them in the hot tub and began yelling obscenities. (Transcript P.175, L.14-18, P.248, L.13-19, P.696, L.2-8).

31. Tolman grabbed Mr. Nielson by the testicles while Bergvall and Nielsen fled into the house. (Transcript P.176, P.248, L.22-25, P.696, L2-8).

32. Tolman forced his way into the house where a struggle ensued. (Transcript P.176).

33. Tolman threw Bergvall into her glass table, breaking it. (Transcript P.176, L.18-22, P.696, L.18-25).

34. Tolman then grabbed Nielsen with a choke hold and they struggled. (Transcript P.177, L.4-8, and L.16-18).

35. Tolman grabbed Bergvall again and threw her against the refrigerator, causing her to hit her head. (Transcript P.177, L.4-8, P.251, L.1-10).

36. Tolman then grabbed Nielsen in another choke hold and tried to push him through the kitchen window. The window was broken and Tolman cut his arm. (Transcript P.178, P.544, L2-9, P.250, L.15-20).

37. After things settled down, Tolman left and Bergvall asked Nielsen to stay because she was frightened. (Transcript P.179, L.20-24, P.254, L.6-8).

38. The next morning, June 11, 1986, at about 8:00 a.m., Ralph Tolman returned and entered the home of Margo Bergvall uninvited. He saw Dave Nielsen asleep on the couch and proceeded to grab him by the testicles. (Transcript P.180, L.7-25, P.254, L.6-8, L.11-21, and P.545, L.15-16).

39. Tolman told Nielsen that he was going to kill him and then began to kick Nielsen in the head and chest. (Transcript P.180, L.18-25, P.254 L.17-21, P.255, L.21-25, P.545, L.22-24).

40. Tolman had been on his way to work on June 11, 1986, when he stopped at Bergvall's house, forcibly entered and assaulted Dave Nielsen. (Transcript 700 L.2-4, P.180 and P.181).

41. Nielsen was allowed to dress while Tolman made more threats on his life, and he left the residence. (Transcript P.256, L.15-16).

42. Tolman subsequently left Bergvall's house and went to his ex-wife's place of business and proceeded to tell her of the events of that morning. (Transcript P.701, P.702).

43. After spending the morning and the lunch hour with his ex-wife, Linda Tolman, Tolman returned to work. (Transcript P.702).

44. Additionally, there was no factual dispute that a assault occurred at Margo Bergvall's residence on June 10 and 11th, as testified to by Tolman and his witnesses. (Transcript 543, P.544, P.545, and P.696-701).

45. In January of 1986, a meeting was called by Don Harmon, Chief Agent of the Investigators of the Salt Lake County Attorney's Office, to discuss a change in policy regarding the personal use of County Attorney vehicles. (Transcript P.261, L.17-24, P.262, L.3-7, P.261, L.17-25).

46. The directive given to the investigators was that the County Attorney vehicles assigned to them could only be used for



official business and not for personal use. (Transcript P.263, L.10-11, P.309, L.4-6, P.669, L.22-25).

47. The vehicle assigned to Tolman was initially a Chevrolet Citation but in the summer of 1986, he was assigned a brown Chevrolet Celebrity. (Transcript P.265, L.6-14).

48. Harmon conducted checks on several Fridays and the following Mondays of the mileage readings of investigators' vehicles. He determined that Tolman's vehicle was used for personal use on the three occasions that he checked. (Transcript P.295, L.15-19, L.22-25, P.296, L.6-13, L.20-25, P.265, L.21-25, and P.266, L.20-25).

49. Harmon gave Tolman a written reprimand for disobeying his directive. (Transcript P.268, L.3-13).

50. The private use of the County Attorney's vehicle by Tolman was also shown by the testimony of Dave Nielsen, who stated that on August 8, 1986, in the early morning hours, he saw Ralph getting into his brown Chevrolet Celebrity after Nielsen was leaving a party at Bergvall's. (Transcript P.257, L.9-15, P.259, L.8-14).

51. On October 8, 1985, Ralph Tolman and Jim Burns of the Salt Lake County Attorney's office were going into the City and County Building when they saw John Harrington of KTVX Television station. (Transcript P.309, L.18-22, P.310, L.1-5, P.415, L.13-25, P.678, L.12-25).

52. Tolman called Harrington "Yellow Hair", which was in reference to a confrontation that Harrington had with Indians in the Wind River area of the week before. (Transcript P.312, L.15-25, P.313, L.1-8, P.416, L.1-12, P.678, L.19-25).

53. A violent verbal exchange followed between Tolman and Harrington. (Transcript P.416, L.1-12).

54. Gross obscenities were used by both Tolman and Harrington. (Transcript P.317, L.10-12, P.418, L.14-15, P.678, L.19-25).

55. Harrington thought that Tolman had been drinking, and that Tolman was going to physically strike him. (Transcript P.418, P.440, L.3-7).

56. Harrington thought Tolman was going to hit him when he had his hands in his pockets. (Transcript P.440, L.8-9).

57. Jim Burns grabbed Tolman and physically took him into the building. (Transcript P.418, L.18-25).

58. Sam Dawson, Ralph Tolman's immediate supervisor, was requested by Bud Ellett, Chief Deputy of the Justice Division, to go to KTVX and defuse the situation if possible. (Transcript P.309, L.18-22, P.311, L.14-16).

59. The verbal confrontation between Harrington and Tolman was observed by several newsmen, who were there to cover the Ronnie Lee Gardner trial. (Transcript P.470, L.6-9, P.310, L.1-5, P.415, L.13-25).

60. Harrington filed criminal charges against Tolman with the Salt Lake City Attorney's Office, but dropped them two weeks later. (Transcript P.419, L.1-3, P.423, L.1-10).

#### SUMMARY OF THE ARGUMENT

This case involves the termination of the Appellant, Ralph Tolman, from his position as a investigator for the Salt Lake County Attorney's office. As a investigator, the Appellant performed many of the same duties as a peace officer of the State of Utah and was required to be peace officer certified.

The Salt Lake County Attorney's office listed six allegations of misconduct which it believed was sufficient to sustain a termination. The record reflects no dispute that the six incidents occurred, the only contention of the Appellant is that the Salt Lake County Career Service Council failed to see the facts in the same light in which the Appellant believed them to be. This Court cannot substitute its judgment of what the facts are but must defer to the findings of the Salt Lake County Career Service Council.

The Appellant asserts that this Court's jurisdiction is invoked by Section 63-46b-16 U.C.A.; however, this is incorrect for this appeal comes to this Court as an appeal from a denial of Appellant's petition for a Extraordinary Writ pursuant to rule

65B(b)(2) of the Utah Rules of Civil Procedure. The basis for review under 65B is whether or not the Salt Lake County Career Service Council abused its discretion or exceeded its jurisdiction. This statutory standard is then reviewed under the tests enunciated in Department of Administrative Services v. Public Service Commission, (see infra.).

The record of the hearing before the Salt Lake County Career Service Council reflects that the Appellant was given his due process rights and his assertion that the Career Service Council failed to consider and rule on the issue of nexus is erroneous. Additionally, the admission of heresay testimony was merely corroborative and not disputed by the Appellant.

The Appellant asks this Court to substitute its judgment for that of the lower tribunal (Salt Lake County Career Service Council) and mitigate the decision of the County Attorney's office and that of the Career Service Council. If this Court adopted his argument, it would require a change from the Supreme Court's decisions in Vetterli and the Discharge of Jones. (See infra).

The record is documented with testimony of numerous witnesses who substantiated the allegations of the County Attorney's office that the Appellant, as a peace officer of the State of Utah, is required to maintain his private life as example

to all. Therefore, Salt Lake County respectfully requests that this Court uphold the decision of the Salt Lake County Career Service Council and that of Judge Noel.

ARGUMENT

POINT I: THIS COURT'S JURISDICTION IS NOT  
INVOKED PURSUANT TO SECTION  
63-46b-16 U.C.A. AND THE STANDARD  
OF REVIEW IS PRESCRIBED BY RULE  
65B(b)(2) U.R.C.P.

The Appellant, in his brief to this Court, has cited Section 63-46b-16, Utah Code Annotated, as the authority for which he asks the Court to reverse the decision of the Career Service Council and the District Court. Section 63-46b-16(1) sets forth the jurisdictional authority by which the Court of Appeals may "review all final agency action resulting from formal adjudicative proceedings." However, 63-46b-1 et.seq., "The Administrative Procedures Act," does not apply to Salt Lake County. The legislature specifically excluded political subdivisions of the State of Utah from the definition of "Agency", i.e., 63-46b-2(1)(b). Salt Lake County is a political subdivision of the State of Utah and, therefore, for Appellant to assert that this Court has jurisdiction pursuant to 63-46b-16 is erroneous and any arguments that the standard of review falls under the Administrative Procedure Act should be stricken.

The Appellant's appeal contests the order of Judge Noel, which denied his Petition for Extraordinary Relief. The Appellant's appeal of the Career Service Council was brought pursuant to Rule 65B of the Utah Rules of Civil Procedure. (See attached Addendum 3).

The Appellant was terminated by the Salt Lake County Attorney office pursuant to the policies adopted by Salt Lake County through authority granted by the "County Personnel Management Act". (17-33-1. et.seq.) This act provides for a independent bipartisan council to hear all disciplinary actions, including terminations, that are not resolved. Section 17-33-4(1) states in part that the decisions of the Career Service Council are final and binding. "However, a right of appeal to the District Court under the provisions of the Utah Rules of Civil Procedure shall not be abridged." The Utah Rules of Civil Procedure provides for an appeal through Rule 65B entitled "Extraordinary Writs". 65B(b)(2) provides in part:

"Appropriate relief may be granted...where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion;"

Several Utah cases have held that the proper statutory authority for review of similar cases is found under Rule 65B(b)(2) i.e., Child v. Salt Lake City Civil Service Commission, 575 P.2d 195 (Utah, 1978), Child petitioned the Court for a

review of his discharge as a police officer pursuant to Rule 65B(b)(2); Lee v. Provo City Civil Service Commission, 582 P.2d 485 (Utah, 1978), Lee appealed his dismissal as a police officer for a extramarital affair; In the Matter of the Discharge of Wayne L. Jones, 720 P.2d 1356 (Utah, 1986), sheriff appealed the decision of the merit commission and the District Court affirmance thereof.

POINT A

THE COURT IS REQUIRED TO CONDUCT  
ITS REVIEW BASED ON THE FACTS AS  
SET OUT IN THE RECORD OF THE  
PROCEEDINGS BEFORE THE LOWER  
TRIBUNAL

The appeal of Ralph Tolman from the judgment of the District Court, which acted as an appellate court, comes to this Court for review as if it had come directly from the Salt Lake Career Service Council. In the matter of Wayne L. Jones, p.1360 supra. The Supreme Court has held in similar cases that the nature and extent of a review of a lower tribunal's decision depends on what happened in the tribunal below, as reflected by its record. Only under limited circumstances may the reviewing court go beyond the record and take new evidence. If, in fact, there was no hearing below or no record was kept, the Court can review the facts itself. Where, however, the lower tribunal conducted a recorded hearing, took evidence, heard sworn

witnesses, or generally comported with due process requirements and made its decision on facts derived from that hearing, a reviewing Court is limited to the record of the lower tribunal. Denver & Rio Grande v. Central Weber Sewer Imp. Dist., 287 P.2d 844 (Utah, 1955); Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032 (Utah, 1984); and Davis County v. Clearfield City, 756 P.2d 1278 (Utah, 1988). For instance, in the Davis County decision, the Court found that the city council had held a "secret meeting" in which a record was not kept and the council's decision was apparently made. Further, the council's ruling included no findings of fact nor reasons for its decision; under these circumstances, the Court found that it was appropriate to take evidence. The Supreme Court has further held that District Courts are limited to taking evidence under circumstances similar to those at issue only when it is necessary to do so based on the inadequacy of the record. Otherwise Summary Judgment based on a review of the record is the appropriate remedy. Child, supra.

This procedure is set out in Rule 65B itself.

Subparagraph (e) as that Rule provides that where the Court determines it is appropriate to issue a writ, "it shall be directed to the inferior tribunal, board or officer, or to any other person having custody of the record or proceedings, commanding such tribunal, board or officer to certify fully to the



Court issuing the writ within a specified time, a transcript of the record and proceedings..."

POINT B

THE COURT IS REQUIRED TO DEFER TO  
THE JUDGMENT AND DISCRETION OF THE  
LOWER TRIBUNAL.

It is an axiom of this type of review, regardless of whether the District Court made its decision based on the record or takes evidence beyond the record, that this Court is required to defer to the judgment and discretion of the lower tribunal. i.e., Salt Lake County Career Service Council. The Davis County case found that even where a District Court goes beyond the record to take evidence, it is still mandated to determine the basis of the lower tribunal's decision and give deference to that decision -- not to take evidence on the merits of the matter before the lower tribunal and decide on its own what is the best decision on the merits. Where the lower tribunal conducted a hearing and arrived at a decision, the reviewing court may not interfere with the discretion of the lower tribunal. Peatross v. Board of Commissioners of S.L. Co., 555 P.2d 281 (Utah 1976).

Further, a reviewing court is obligated, when it is dealing with a lower tribunal which has specialized knowledge in a particular field, such as a planning and zoning board or, as in this case, the Career Service Council, to allow a comparatively

wider latitude of discretion and a presumption of correctness of the decision of that lower tribunal. This Court under the facts presented to the Salt Lake County Career Service Council should not lightly interfere with that body's decision. Xanthos, supra.

POINT C

THE COURT'S REVIEW IS LIMITED TO  
WHETHER THE LOWER TRIBUNAL EXCEEDED  
ITS JURISDICTION OR ABUSED ITS  
DISCRETION AND THE COURT MAY NOT  
SUBSTITUTE ITS JUDGMENT ON THE  
MERITS.

The Appellant, in his appeal brief, sets forth the standard for review that was promulgated by the Supreme Court in the Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983) and followed by this Court in the case of Taylor v. Utah State Training School, 775 P.2d 432 (Ut. App. 1989). However, the standard explained in these cases does not overturn previous decisions concerning the standard of review, but only clarifies them. The continuum of review as explained by Justice Oaks in Administrative Services is applied to whether the Salt Lake County Career Service Council abused its discretion or exceeded its jurisdiction. Review is limited to the question of abuse of discretion or excess of jurisdiction. It is not within the Court's prerogative to substitute its judgment if the record discloses that there was a reasonable basis for the decision below. Xanthos, supra,. Rule 65B(b)(2) has, itself,

clarified the standard of review in such cases holding that review does not extend to the merits of the decision, but solely to whether the inferior tribunal, Salt Lake Career Service Council, abused its discretion or exceeded its jurisdiction.

"Abuse of discretion" is not an undefined standard; rather, it refers to acting arbitrarily or without a basis in reason and the Findings of Fact will only be upset where they are so without foundation they must be deemed capricious and arbitrary. Utah Dept. of Admin. Services, p.608. For instance, a lower tribunal's refusal to provide written findings of fact may suggest that there is no rational basis for its decision and thus its decision may well have been arrived at arbitrarily. Davis County, supra. Minor irregularities in the decision process are not by themselves sufficient to constitute arbitrariness or acting without a basis in reason. Absent such arbitrariness or lack of factual basis, the reviewing court cannot disturb the lower tribunal's findings. Erkman v. Civil Service Commission of Provo City, 198 P.2d 238 (Utah, 1948).

## II

### THE HEARING BEFORE THE CAREER SERVICE COUNCIL DID NOT VIOLATE DUE PROCESS

The Appellant asserts in his appeal that he was not given a fair hearing for the reason that the Career Service Council allowed Sam Dawson to relate Dave Nielson's testimony, that the Council

failed to rule that evidence of off-duty conduct could not be presented, and that there was prejudice because a deputy Salt Lake County Sheriff was present throughout the hearing. There is nothing in the record submitted to this Court that demonstrates an unfair hearing. "Due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal..." However, "a substantial showing of personal bias is required to disqualify a hearing officer or obtain a ruling that a hearing is unfair." Roach v. National Transportation Safety Board, 804 F.2d 1147, 1160 (10th Cir. 1986). The minimum level of due process required at an administrative hearing does not rise to the same standards set for litigation in a court. "It is well settled under federal and state law that due process consideration does not require the full array of procedural tools available to a plaintiff in a administrative hearing." Damino v. O'Neill, 702 F.Supp. 949,953 (E.D.N.Y. 1987); e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494 (1985); Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989). The Supreme Court of Utah has also spoken to the difference between administrative hearings and trials. In the case of Wilson v. Industrial Commission of Utah, 735 P.2d 403 (Utah, 1987); the Court stated: "this Court has long recognized that there are significant differences between court trials and proceedings before

administrative agencies and that the technical rules of evidence need not be applied before the latter." e.g., Erkman, Supra.

The procedures that ensure a fair hearing under the Due Process Clause are as follows: (1) prior notice of the charges (the Appellant was given the notice of intent to terminate on September 8th of 1986, which set forth the specific allegations. see Addendum 1); (2) a hearing before an impartial panel (hearing commenced on November 3rd of 1986, and required almost one month to complete and the record is filled with rulings where the Council stated it wanted to hear all the evidence, Transcript p.33, L.13-18, and it allowed each side to present its evidence); (3) representation by legal counsel (Appellants' present counsel represented him in the hearing before the Career Service Council); (4) cross-examination of the witnesses (the record speaks for itself); (5) to present evidence in his own behalf. (The record speaks for itself); and (6) Appellant's right to inspect documentary evidence against him (the record speaks for itself). Sheehan v. Board of Fire & Police Commissioners of Des Plaines, 509 N.E. 2d 467 (Ill. App. 1987).

In reference to Appellant's allegation of improper use of hearsay testimony presented by Investigator Sam Dawson, he fails to point out that the County Attorney's office presented the following facts to the Career Service Council: (1) Margo Bergvall was called

upon and testified of the events of June 10, and June 11, 1986, regarding the Appellant, herself and Dave Nielsen; (2) that Dave Nielsen was identified as a witness by the County Attorney's Office; (3) that he was served a subpoena by County Attorney's office to appear before the Career Service Council on a date certain; (4) that he was contacted by telephone on the date of his appearance and informed the County Attorney's office that he would not appear; (5) that Sam Dawson interviewed Dave Nielsen on October 29, 1986 and testified concerning that conversation; and (6) that the testimony of Dave Nielsen corroborated the testimony already given by Margo Bergvall. (Transcript P.239, L.8-17, P.241, P.244, L.10-15). Additionally, there was no evidence presented at the hearing that the Appellant himself sought to subpoena Mr. Nielsen. The Career Service Council made a rational decision regarding the admission of Sam Dawson's testimony based upon the facts before it. (Transcript P.244, L.14-24). Additionally, the Career Service Council was aware of Salt Lake County Policy 5710, 7.0, which states that hearings will not be bound by legal procedures nor legal rules rules of evidence, and United States v. Lumkin, 767 F.2d 1182 (1982) which allowed the use of hearsay testimony in a murder trial. (Transcript P.234).

There is no case in Utah which states that hearsay is not admissible in an administrative hearing. In Wilson, cited supra,

the Supreme Court of Utah stated: "Hearsay evidence is admissible in proceedings before administrative agencies. However, findings of fact cannot be based exclusively on hearsay evidence." p.404 The finding of fact #6 was not based exclusively upon the hearsay testimony of Dave Nielsen and therefore no due process rights of the Appellant were violated.

The Appellant has alleged that the Career Service Council's decision to allow an armed deputy sheriff to be present throughout the hearing had a prejudicial effect upon the Council, and therefore, the Appellant was denied due process. As set forth previously, a administrative hearing is not required to comport with the same procedural safeguards as that of a trial. However, even in a criminal setting, the presence of an armed guard at a trial in front of a jury has been held not to violate the defendant's due process rights. Hardee v. Kuhlman, 581 F.2d 330 (2nd. Cir. 1978) Compelling a defendant to appear before a jury wearing handcuffs and leg irons held not to be a denial of due process. Marquez v. State, 725 S.W.2d 217 (Tex. Cr. App. 1987). There is nothing in the record which would point to how the Appellant was prejudiced by the presence of a deputy sheriff, and therefore respondent submits that Appellant's due process rights were not violated.

### III

THE CAREER SERVICE COUNCIL DID NOT  
COMMIT REVERSIBLE ERROR AND DID RULE  
ON THE ISSUE OF OFF-DUTY CONDUCT AND  
ITS RELATIONSHIP TO THE COUNTY  
ATTORNEY'S OFFICE.

In the pre-hearing conference before the Career Service Council, the Appellant asked the Council to rule that any evidence of off-duty conduct not be heard or used as a basis for termination. The Appellant alleges that the Council failed to make a ruling upon the issue of "nexus" between the employment and the off-duty actions of the Appellant. This is not accurate or true. The chairman of the Career Service Council stated: "First of all, I'd like to explain that we view this hearing really as a fact finding, information gathering hearing. And that Council members, ... have a great responsibility to listen to the evidence and weigh the evidence and give the value to it that should be given. And this isn't a legal hearing where we have narrow rules of evidence and we want to hear information that has relevant value, probative value and substantive value. So we feel that actually these motions [to limit evidence regarding off-duty conduct] have too much of a narrowing effect on the hearing." (Transcript P.33, L.9-20). Counsel for the Appellant then asked to strike the allegations of the assault and battery on Margo Bervall, because it occurred on off-duty time and it was



scandalous. (Transcript P.45, L.12-22). Subsequently, Counsel withdrew his motion for the reasons that he believed supporting documents had been submitted to the Council prior to the hearing. He stated: "I'll withdraw the motion, I'd assumed you had been given the same documents...that we had." (Transcript P.47, L.11-13). He then states: "Fine. Okay, then I'll withdraw that." (Transcript P.47, L.20-21).

The Appellant fails to understand that off-duty conduct of a law enforcement officer is relevant to his employment because he is held to a higher standard of conduct than the average citizen. In fact, off-duty conduct alone may be sufficient to justify the termination of one's employment, particularly when that person occupies the position of a law enforcement officer for the State of Utah. The Supreme Court of Utah has upheld the termination of police officers for off-duty conduct in the following: Child v. Salt Lake City Civil Service Commission, 575 P.2d 195 (Utah, 1978), off-duty altercation at a bar which resulted in the death of a citizen. Hutchinson v. Cartwright, 692 P.2d 772 (Utah, 1984) a jailor's conduct at a deposition resulted in termination. Lee v. Provo City Civil Service Commission, 582 P.2d 485 (Utah, 1978), Provo City Police Officer terminated for extra-marital relationship with a female dispatcher. e.g., In the Matter of the Discharge of Wayne L. Jones, 720 P.2d 1356 (Utah, 1986), Sheriff deputy's purchase under duress of jail inmate's property.

Courts throughout the United States recognize that off-duty conduct of a police officer may be grounds for termination. In the case of Philadelphia Civil Service Commission v. Wojtusik, 525 A.2d 1255 (Pa. Cmwlth. 1987), the termination of an off-duty police officer was upheld because he struck a police officer who was attempting to place him under arrest. In Whitmore v. Civil Service Merit Board of Shelby, 673 S.W.2d 535 (Tenn.1984), a police officer was terminated for theft of electricity from his residence. Respondents assert that Appellant's argument that there is no nexus between his employment and his off-duty conduct is not well taken and the Court should rule that the Career Service Council acted with reason.

#### IV

#### THE CAREER SERVICE COUNCIL DECISION TO UPHOLD THE TERMINATION OF THE PETITIONER SHOULD BE UPHELD

The Appellant argues that if the Court finds an "adequate showing of justification for the imposition of a penalty in this case, it is reasonable for the court to conclude that the penalty of termination should be mitigated downward substantially." The assertion misstates the law on all counts. The correct test to be applied is found in Vetterli v. Civil Service Commission of Salt Lake City, 145 P.2d 792 (Utah, 1944) and quoted in the case of the

Discharge of Wayne L. Jones, cited supra. The Supreme Court of Utah stated that a Civil Service Commission's authority on review of the disciplinary action involves an inquiry as to whether (1) the facts support the charges made by the department head, and if so, (2) whether the charges warrant the sanction imposed. The Court in Jones stated "The second Vetterli inquiry, whether the charges warrant the sanction imposed, is a limited one. The sheriff must manage and direct his deputies, and [he] is in the best position to know whether their actions merit discipline. If the Merit Commission finds upon review that the facts support the charges against the deputy, then it must affirm the sheriff's disciplinary action, unless it finds the sanction so clearly disproportionate to the charges as to amount to an abuse of the sheriff's discretion." (P.1363). Likewise, the County Attorney is in the best position to know whether the action of an investigator merits discipline and unless the termination is so clearly disproportionate to the charges that it amounts to an abuse of discretion, this Court must uphold the decision. Appellant in his brief refers to a Confidential Memorandum that it was the opinion of the Counsel for the County Attorney's office that a termination would not be sustainable. The reference to a attorney work product that was confidential is absolutely irrelevant. Counsel who prepared the memo did not hold a position

of authority to even recommend disciplinary action and said confidential memorandum was prepared prior to interviews with Margo Bergvall and Dave Nielsen. (See attached Objection to Petitioner's Motion For Leave to Submit New Evidence and accompanying affidavits marked as Addendum 4).

A police officer must hold himself to a higher standard of conduct than the average citizen. This higher standard was recognized in the case of the Discharge of Jones. The Supreme Court quoted from The Law Enforcement Code of Ethics for police officers and stated, " The (Code) states, among other things, that a police officer will...keep my private life unsullied as an example to all" and "honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land..." (P.1361, 1362). Evidence was also presented to the Career Service Council concerning this higher standard. All law enforcement personnel called to testify recognized this higher standard including the Appellant. (Transcript P.730, L.21-25, P.731, L.5-8). Investigator Mike George, who worked with the Appellant at the Sheriff's Office and at the County Attorney's Office testified that: "We have a higher responsibility. Everything that we do as investigators is scrutinized by the courts. If you will, we are contained within a fishbowl....so we have to maintain ourselves to a higher standard. It comes with

our duty as police officers and representatives of the people of Salt Lake County." (Transcript P.759, L.5-10). Mike George was asked whether Ralph Tolman had brought unwarranted attention to the office of the County Attorney. He stated that he had constantly in the last six months. (Transcript P.759, L.21-25, P.760, L.1-3).

Ralph Tolman's conduct either off-duty of driving under the influence of alcohol, assaulting Ms. Bergvall and Mr. Nielsen, or his heated verbal exchange with John Harrington cannot be condoned by any law enforcement organization and therefore Respondents assert that Appellant's sanction should not be mitigated.

V

PRIOR CONDUCT OF THE APPELLANT MAY BE  
USED IN PRESCRIBING THE SANCTION TO  
BE IMPOSED.

The Appellant asserts that the County Attorney's office has used prior offenses where he had been previously disciplined prior to this action to terminate the Appellant. Respondents reply that of the six allegations, he was disciplined on only two, i.e., D.U.I. arrest of June 5, 1981, and a letter of reprimand for disobeying the directive to not use the County car for personal use. There is no single action upon which the Appellant was terminated, but several allegations of severe misconduct that were

public service. The Appellant asserts that the Respondents have violated the concept of Double Jeopardy by including the prior disciplinary actions and he cites several cases in from Illinois. However, a recent Illinois case allowed the use of prior disciplinary action in consideration of the sanction that was imposed. In the case of Price v. Board of Fire and Police Commissioners, 487 N.E.2d 673 (Ill.App.4 Dist. 1985), the Court stated in regards to the interpretation of a personnel statute: "Prohibition against double jeopardy is applicable only to criminal proceedings, and public employee disciplinary proceedings are civil in nature." (P.676). An employee's past record in a disciplinary proceeding cannot be utilized to prove a present charge, but it may be used to provide guidance to determining the appropriate penalty for the current offense. In the Matter of Wenderwicz, 478 A.2d 429 (N.J.Super.A.D.1984).

#### CONCLUSION

The Salt Lake County Career Service Council held a hearing concerning allegations of misconduct by the Appellant. The Appellant was given notice of the charges, he was allowed to go through his file at the County Attorney's office and a copies of all documents were made and given to him, (Transcript P.13, L.21-25, P.14, L.1-2). He was represented by counsel. He had the opportunity to cross-examine witnesses, and review the documents,


and he had a fair hearing. The Appellant now comes before this Court and asks the Court to substitute its judgment for that of the Career Service Council. He asks this Court to believe his version of the facts, and he asks this Court to set aside the decision to uphold the termination. The Appellant also attacks the Findings of Fact as being "sketchy" and of no value. Findings of Fact may be general so long as they satisfy the dual requirements of making intelligent court review possible, and apprising the parties of the basis of the action taken. McQuillin Mun. Corp. Section 45.86 (3rd Ed).

The correct review standard to be applied is set forth in Vetterli, to-wit: do the facts support the allegations, and if so, do the charges warrant the sanctions imposed. The review of the Career Service Council decision is a limited one. To allow otherwise would invite this Court to substitute its judgment on the merits for that of the inferior tribunal. (Career Service Council). This, a reviewing Court should not and cannot do. The Court may disturb the findings of the inferior tribunal only where those findings are not supported by the evidence. Lee v. Provo City, cited supra.

WHEREFORE, Respondents ask this Court to rule that the Salt Lake County Career Service Council did not exceed its jurisdiction or abuse its discretion and that the Court dismiss appellant's appeal.

DATED this 3rd day of August, 1990.

DAVID E. YOCOM  
Salt Lake County Attorney

  
JERRY G. CAMPBELL  
Deputy County Attorney



11. ADDENDUM

1. Notice of intent to terminate.
2. Findings of Fact, Conclusion of Law, and Decision.
3. Summons and Petition For Extraordinary Relief.
4. Objection to Petitioner's Motion For Leave to Submit New Evidence.



# Office of the Salt Lake County Attorney

T.L. "TED" CANNON

County Attorney

MICHAEL N. MARTINEZ

Chief Deputy County Attorney



September 8, 1986

Ralph Tolman  
Salt Lake County Attorney's  
Office  
231 East 400 South  
Salt Lake City, Utah 84111

SUBJECT: Notice of intent to terminate.

Dear Ralph:

This letter is to inform you that pursuant to Sections 17-33-5(3)(p) 1733-7(2)(e) and 17-33-10, U.C.A. (1953 as amended) and Salt Lake County Policy 5715, I am terminating your employment with the Salt Lake County Attorney's Office effective September 19, 1986. Your last working day at the office will be September 19, 1986.

This decision is based upon your continuing misconduct and acts inimical to public service; i.e., your D.U.I. arrests and other incidences which reflect poorly upon this office, tarnishes the image thereof, and you have failed to obey reasonable orders of your supervisor. Because of your inappropriate behavior, this office is left with no alternative but to terminate your employment. Additionally, your acts reflect an emotional instability which not only present a danger to the citizens of Salt Lake County but places your status of a police officer in jeopardy.

The specific incidences on which this office relies are as follows:

1. On June 5, 1981, you were arrested by the Utah Highway Patrol for driving under the influence of alcohol. You subsequently pled guilty to a lesser included offense of reckless driving. You were verbally warned and given five days suspension by Don Sawaya, Chief Deputy of the Recovery Division, with the admonishment that any further acts of this

231 East 4th South Salt Lake City, Utah 84111 (801) 363-7900

Administration  
Roger A. Livingston  
Chief Deputy County Attorney  
for Administrative Affairs  
4th Floor

☐ County Attorney Victim Services  
Julie Branch  
Director  
4th Floor

☐ Justice Division  
Walter R. Ellett  
Chief Deputy  
3rd Floor

☐ Investigative Agency  
Don Harman  
Special Agent in Charge  
4th Floor

☐ Civil Division  
William R. Hyde  
Chief Deputy  
2nd Floor

☐ Governmental Services  
Donald Sawaya  
Chief Deputy  
2nd Floor

nature would result in your termination. (See attached memos of D.U.I. charges marked as Attachment 1).

2. In 1984 you were apprehended by the Midvale Police after you and your wife left the Sage Lounge. Sergeant Tim Short of the Midvale Police Department determined that you were too intoxicated to drive. Because of your position with this office, you were not arrested but allowed the opportunity to find another way home.

3. On August 18 of this year, you were arrested by a Salt Lake City police officer for running a red light and Driving under the Influence. Your breathalyzer test showed a .15 percent alcohol content. (See attached copies of police report marked as Attachment 2). Certainly three D.U.I. offenses within six years demonstrates poor judgment by a police officer who is sworn to obey the law.

4. On June 10, 1986, you assaulted and battered Margo Bergwall. This office recognizes that relationships develop between adults, but your actions in regards to Ms. Bergwall demonstrate an inability to control your emotions. Clearly this office cannot tolerate your intimidations and threats made to Ms. Bergwall and her acquaintances.

5. In a memo of January 1986, you and the other investigators were directed that County Attorney vehicles were not to be used for personal use or on the weekends. Your obvious disobedience of this directive has been documented by Don Harmon, who checked your mileage on two different occasions. Furthermore, you were observed on August 9, 1986 at Ms. Bergwall's residence in a County Attorney's Office vehicle. (See attached memos dated February 5, 1986 from Lt. Sam Dawson, and memo dated February 4, 1986 marked as Attachment 3).

6. Your confrontation with John Harrington on October 8, 1985 again demonstrates poor judgment by an investigator of this office. (See attached memo marked as Attachment 4).

7. In September of 1982, you lied to your immediate supervisor concerning the transportation of a witness. Clearly this office must trust its employees to be truthful and this applies even more to one who is a sworn peace officer. (See attached memos marked as Attachment 5).

It is for the above stated reasons that it is this office's decision to terminate your employment. You have the right to have a pretermination hearing to present any mitigating factor in your favor. Said hearing will be held 10 o'clock Friday, September 12, 1986. In the event that your

Ralph Tolman  
September 8 , 1986  
Page 3

explanations do not mitigate the above charges, your termination will be effective on the date first above written.

Please find attached a copy of Salt Lake County Policy 5705, entitled Grievance Procedure. This action will be heard at the department review level.

Sincerely,

SALT LAKE COUNTY ATTORNEY



T. L. "Ted" Cannon

(0923J)

BEFORE THE SALT LAKE COUNTY

RECEIVED

CAREER SERVICE COUNCIL

DEC 29

IN RE: Appeal of  
RALPH TOLMAN

:

:

:

COUNTY /  
CIVIL D  
FINDINGS OF FACT.  
CONCLUSIONS OF LAW,  
AND DECISION

Case No. 86-15

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This matter came on for hearing before the Salt Lake County Career Service Council on November 5, 1986 and concluded on November 19, 1986. Council members. Sherril R. Guyon, Willard J. Homer, and Robert S. Adams were present. Appellant. Ralph Tolman, was present and represented by his counsel L. Zane Gill, attorney for the Utah Public Employee's Association. The Salt Lake County Attorney's Office was represented by Don Sawaya, as Department representative, and Jerry Campbell, Deputy County Attorney. Testimony was given, facts were adduced, exhibits were received, and otherwise being fully advised in the matter, the Council hereby enters its Findings of Fact, Conclusions of Law, and Decision.

## FINDINGS OF FACT

1. The Appellant. Ralph Tolman. was hired as an Investigator for the Salt Lake County Attorney's Office on April 1, 1980.

2. That the responsibilities and duties of an investigator were the same responsibilities and duties as a law enforcement officer in the State of Utah and that the position of Salt Lake County Investigator required peace officer certification.

3. That on the early morning hours of June 5, 1981, Ralph Tolman, who was not on duty with the Salt Lake County Attorney's Office, was arrested by the Utah Highway Patrol for driving under the influence of alcohol. Mr. Tolman had been driving a Salt Lake County Attorney's Office vehicle and had a firearm in the glovebox. Mr. Tolman was verbally warned and given five days suspension by the Salt Lake County Attorney's Office after he had plead guilty to a lesser offense of reckless driving.

4. In 1983 or 1984, Ralph Tolman was observed by two Officers of the Midvale Police Department exiting the Sage Lounge. One of the officers testified that he observed Mr. Tolman stagger towards a vehicle, enter the vehicle, and start its engine, whereupon they blocked the vehicle from leaving the area. The other officer testified that he saw Mr. Tolman exit the Lounge and that he saw the brake lights of Mr. Tolman's vehicle.

This Council believes the Officer's version of the events at the Sage Lounge when they indicated Ralph Tolman was in fact behind the wheel of the vehicle and was attempting to leave. This Council further believes the Officer's version that Mr. Tolman was in fact intoxicated from alcohol and that had he not been an Investigator for Salt Lake County, he would have been arrested by the Officers of Midvale.

5. On August 18, 1986, Mr. Tolman was arrested for driving under the influence of alcohol at approximately 17th South and 11th East. His blood alcohol level was .152. Mr. Tolman admitted that he had plead guilty to an alcohol-related reckless

driving offense. This Council notes that on August 18, 1986, Ralph Tolman was not on duty nor was he on duty in the incident at the Sage Lounge in Midvale.

6. In regards to the allegations of June 10, 1986, this Council finds that Ralph Tolman did assault and batter a female acquaintance and her male friend at her home while Mr. Tolman was off duty. However, on the day of June 11, 1986, while Ralph Tolman was on duty, he entered her home and assaulted and battered her male friend. The facts were that Ralph Tolman was on his way to work on June 11, 1986, in a Salt Lake County Attorney's vehicle when he stopped his car at the female acquaintance's house at approximately 8:00 a.m and entered the home. The Council finds that in regards to this incident, Mr. Tolman used poor judgment and that his actions constituted acts inimical to public service.

7. In January of 1986, Ralph Tolman and the other Investigators were instructed not to use their County vehicles for personal use. The facts were that Ralph Tolman used his vehicle on three separate occasions for his own personal use and this was in violation of a direct order from a supervisor, a clear act of insubordination. Nothing was presented by the Appellant which would mitigate his actions for disobeying a direct order.

8. The Council further finds that Mr. Tolman exhibited very poor behavior when he launched a verbal attack against a local news reporter on October 8, 1985. Clearly, Ralph Tolman was the instigator of a very heated argument. The Council finds that the location of the incident combined with the fact that a

well-known trial was being held in the close proximity demonstrates not only a lack of good judgment, but also constitutes acts that would bring discredit and disfavor to the County Attorney's Office. The actions showed a lack of professionalism as a law enforcement officer. The Council notes that the incident with the local news reporter occurred while Mr. Tolman was on duty and that the evidence was clear that Mr. Tolman had not been drinking, thus, alcohol was not a contributing factor in the Appellant's behavior.

#### CONCLUSIONS OF LAW

This Council, will apply the law of the State of Utah as set forth in Vetterli v. Civil Service Commission of Salt Lake City, 145 P.2d 792 (1945). This Council believes that the Respondent, Salt Lake County Attorney's Office, has satisfied the requirements of Vetterli in that (1) the allegations against Ralph Tolman by the Salt Lake County Attorney's Office were not only supported by the facts but that they were not controverted; (2) the action taken, the termination of Ralph Tolman, was warranted. It is this Council's opinion that a law enforcement officer is held to a higher standard of responsibility than the average citizen and that the higher standard of duty is evident in the Law Enforcement Code of Ethics wherein it states in part that a police officer will keep his private life unsullied as an example to all and that he will be exemplary in obeying the laws of the land.

This Council believes that the actions by Mr. Tolman in regards to the assault incident and the verbal confrontation with



the news reporter, in addition to the DUI arrests, demonstrate very poor judgment by Ralph Tolman and brings discredit to and tarnishes the image of the Salt Lake County Attorney's Office.

The totality of the allegations against Ralph Tolman demonstrated a pattern of conduct which merited termination from the Salt Lake County Attorney's Office. His actions did constitute acts inimical to the public service. Each allegation individually may not alone be sufficient to merit termination, but combined together, they present a pattern of misconduct by the Appellant which warrants the action taken.

The relationship between the off-duty conduct and Mr. Tolman's position as a Salt Lake County Attorney Investigator was clear. Certainly, a police officer or County Attorney's Investigator has a higher duty to obey the laws than that of the average citizen. When off-duty conduct is brought to the attention of the public which casts a poor image upon public service or in this case the Salt Lake County Attorney's Office, the agency is justified in the termination action.

This Council is not persuaded nor do we find any facts to support the contentions of the Appellant that he was terminated as a result of his political support of a local candidate or that his actions should be excused because he had consumed alcohol. No facts were presented to show that Ralph Tolman was an alcoholic.

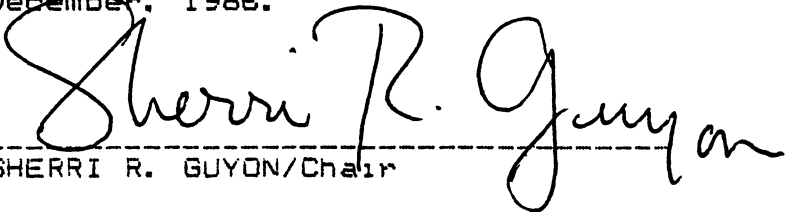
In fact, the Council concludes that alcohol is not a contributing factor to Mr. Tolman's unprofessional conduct. This conclusion is based upon comparing the incident of the verbal

exchange between Mr. Tolman with the news reporter where the Appellant had not been drinking to the incidents with the female acquaintance where he had been drinking, demonstrate lack of judgment and conduct unbecoming a police officer.

#### DECISION

This Council, therefore, unanimously finds that the Respondent's allegations are supportable by the facts and that the sanctions imposed of termination were warranted.

Dated this 3<sup>rd</sup> day of December, 1986.

  
-----  
SHERRI R. GUYON/Chair

  
-----  
WILLARD J. HOMER/Vice-Chair

  
-----  
ROBERT S. ADAMS/Member (R)

#### MAILING CERTIFICATE

I hereby certify that I have mailed a true and exact copy of the foregoing Findings of Fact, Conclusions of Law, and Decision to Zane Gill, counsel for Appellant; Jerry Campbell, counsel for Department, and J.D. Johnson, Director of the County Human Resources Division, this 3 day of December, 1986.

  
-----  
KAY L. BATES/Coordinator

L. Zane Gill (3716) of  
BIELE, HASLAM & HATCH  
Attorneys for Petitioner  
50 West Broadway, Fourth Floor  
Salt Lake City, Utah 84101  
Telephone: 328-1666

265 on 88  
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B/R State  
UPON Kay Gates - agent  
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Kay Gates DEPUTY

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ORNEY  
SIGN

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RALPH TOLMAN,	)	
	)	
Petitioner,	)	SUMMONS
	)	
vs.	)	
	)	
SALT LAKE COUNTY CAREER SERVICE	)	
COUNCIL and SALT LAKE COUNTY	)	
ATTORNEY,	)	
	)	
Respondents.	)	Civil No. _____

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT SALT LAKE COUNTY CAREER SERVICE COUNCIL:

You are hereby summoned and required to serve upon or mail to Plaintiff's attorney at 50 West Broadway, Fourth Floor, Salt Lake City, Utah 84101, an answer in writing to the Petition for Extraordinary Relief and file a copy of said answer with the Clerk of the above-entitled Court within Twenty (20) days after service of this Summons upon you. If you fail to so do, Judgment by Default will be taken against you for the relief demanded in said Petition, which has been filed with the Clerk of the Court, and a copy of which is hereto annexed and herewith served upon you.

DATED this 21 day of January 1988.

BIELE, HASLAM & HATCH

L. Zane Gill  
L. Zane Gill  
Attorneys for Petitioner

Defendant's Address:

Salt Lake County Career Service Council  
2001 South State Street  
Salt Lake City, Utah 84115

**L. Zane Gill of  
BIELE, HASLAM & HATCH  
Attorneys for Petitioner  
50 West Broadway, Fourth Floor  
Salt Lake City, Utah 84101  
Telephone: (801) 328-1666**

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR  
THE COUNTY OF SALT LAKE, STATE OF UTAH

**RALPH TOLMAN.**

**Petitioner,**

**VS.**

SALT LAKE COUNTY CAREER SERVICE  
COUNCIL, and SALT LAKE COUNTY  
ATTORNEY,

## Répondants.

# PETITION FOR EXTRAORDINARY RELIEF

**Civil No.**

## Judge

Petitioner, Ralph Rolmān, by and through his counsel of record, L. Zane Gill of Biele, Haslam & Hatch, brings this action pursuant to Rule 65B(b)2 of the Utah Rules of Civil Procedure. The jurisdiction of this Court is sought on the basis that the Salt Lake County Career Service Counsel, an inferior tribunal, exercising judicial functions, has exceeded its jurisdiction and/or abused its discretion.

## PARTIES

1. The petitioner Ralph Tolman is an individual residing at all relevant times in Salt Lake County, State of Utah.

2. The respondent Salt Lake County Career Service Council is an agency of Salt Lake County government whose function it is to hear administrative appeals of employment grievance matters within Salt Lake County government. At the time relevant to this matter, the members of the Salt Lake County Career Service Council were Robert Adams, Sherry Guyon and Willard Homer. The Salt Lake County Career Service Council is named as an entity and the individuals comprising the council are not named individually.

3. Respondent Salt Lake County Attorney is the elected county official responsible for the operations of the Salt Lake County Attorney's office, the former employer of petitioner Ralph Tolman.

#### **BASIS OF THIS ACTION**

1. Petitioner Ralph Tolman was hired by the Salt Lake County Attorney's office on April 1, 1980 after having served as a Salt Lake County Deputy Sheriff for several years.

2. The Salt Lake County Attorney's office, through its elected County Attorney, Ted L. Cannon, instituted termination proceedings against petitioner allegedly based upon conduct violative of the law enforcement code of ethics. The charges against petitioner were set forth in a notice of intent to terminate dated September 8, 1986. A copy of that document is attached hereto as Exhibit A.

3. Preliminary hearings and a grievance hearing were held in this matter before the Salt Lake County Career Service Council in October and November 1986.

4. A final decision of the Salt Lake County Career Service Council was rendered on December 3, 1986. A copy of the findings of fact, conclusions of law and decision is attached hereto as Exhibit B.

5. On December 23, 1986, petitioner filed a notice of appeal with the clerk's office of Salt Lake County with the intent of commencing an appeal of the final order of the Salt Lake County Career Service Council pursuant to Rule 73(h) of the Utah Rules of Civil Procedure. A case file was opened in that matter, case no. C-86-9430. In that action, Ralph Tolman sought a review of the final administrative order of the Salt Lake County Career Service Council and named as respondent Salt Lake County Attorney's office.

6. On December 2, 1987, the Salt Lake County Attorney's office made a motion to dismiss the petitioner's appeal in case no. C-86-9430. A hearing was held on that motion on Friday, January 8, 1988, before the Honorable Judge Moffat. Petitioner's appeal was dismissed without prejudice.

7. In the process of preparing his appeal in the action which has now been dismissed, petitioner obtained the tape recorded record of the hearings held before the Salt Lake County Career Service Council. Petitioner's counsel attempted to make a written transcript from those tape recordings; however, the quality of the tape recording was so poor that the transcript has little value as a reference document.

8. The Career Service Council committed reversible error by failing to rule before the evidentiary hearing on petitioner's motion regarding "nexus."

9. The Career Service Council committed reversible error by failing to consider its legal obligation to mitigate penalties.

10. The Career Service Council committed reversible error by failing to rule that the County Attorney's office may not impose double jeopardy for events which are the subject of former discipline.

11. The Career Service Council committed reversible error by conducting the hearing in such a manner as to deprive the petitioner of his ~~employment without due process of law.~~

12. The Career Service Council committed reversible error by allowing key portions of the testimony against petitioner to be entered into the record through hearsay and then basing its ultimate decision upon the events to which the hearsay related.

WHEREFORE, petitioner requests

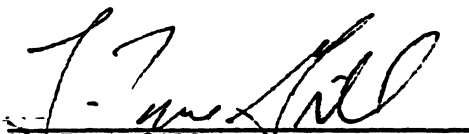
1. That a writ issue directing the Salt Lake County Career Service Council, ~~its members and employees,~~ to certify fully to this Court, within 30 days, a written transcript of the record and proceedings held before it.

2. That this Court conduct a review of the transcript of the hearing before the Career Service Council, consider the memorandum of law to be filed at a later date by petitioner, take oral argument on the issues raised herein, render a decision and order compelling the Salt Lake County Career Service Council to reverse its decision sustaining the termination of the petitioner and issue amended findings of fact, conclusions of law

and an order compelling the Salt Lake County Attorney's office to reinstate the petitioner with full back pay and benefits and reasonable attorney's fees.

DATED this 21<sup>st</sup> day of January 1988.

BIELE, HASLAM & HATCH

A handwritten signature in black ink, appearing to read "L. Zane Gill", written over a horizontal line.

L. Zane Gill  
Attorneys for Petitioner



DAVID E. YOCOM  
 Salt Lake County Attorney  
 JERRY G. CAMPBELL (#0555)  
 Deputy County Attorney  
 2001 South State, #S3400  
 Salt Lake City, Utah 84190  
 Telephone: (801) 468-2653

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

RALPH TOLMAN,	)	
	)	
Petitioner,	)	OBJECTION TO PETITIONER'S
vs.	)	MOTION FOR LEAVE TO
	)	SUBMIT NEW EVIDENCE
SALT LAKE CAREER SERVICE	)	
COUNCIL and SALT LAKE	)	Civil No. C-88-373
COUNTY ATTORNEY,	)	
	)	Judge Frank G. Noel
Respondents.	)	


---

Respondant, Salt Lake County Attorney, hereby objects to  
 Petitioner's Motion for an order allowing the submission of  
 alleged new evidence on the basis that a memorandum written  
 by deputy Jerry G. Campbell to Bill Hyde is irrelevant,  
 immaterial and constitutes attorney work product.

This Motion is more fully set forth in the accompanying  
 memoranda.

DATED this   1   day of September, 1989.

DAVID E. YOCOM  
 Salt Lake County Attorney

By   
 JERRY G. CAMPBELL  
 Deputy County Attorney

OBJECTION TO PETITIONER'S MOTION  
Civil No. C-88-373  
Page two

MAILING CERTIFICATE

I hereby certify that on this \_\_\_\_\_ day of September, 1989, a copy of the foregoing Objection to Petitioner's Motion For Leave to Submit New Evidence was mailed, postage prepaid, to the following:

L. Zane Gill  
Attorney for Petitioner  
50 West Broadway, Suite 900  
Salt Lake City, Utah 84101

Denise Mendenhall

C138+(6&7)

DAVID E. YOCOM  
Salt Lake County Attorney  
JERRY G. CAMPBELL (#0555)  
Deputy County Attorney  
2001 South State, #S3400  
Salt Lake City, Utah 84190  
Telephone: (801) 468-2653

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

RALPH TOLMAN,	)	
Petitioner,	)	MEMORANDA IN OPPOSITION
vs.	)	TO PETITIONER'S MOTION
	)	TO SUBMIT NEW EVIDENCE
SALT LAKE CAREER SERVICE	)	
COUNCIL and SALT LAKE	)	Civil No. C-88-373
COUNTY ATTORNEY,	)	
Respondents.	)	Judge Frank G. Noel

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Respondent, Salt Lake County Attorney by and through its attorney, Jerry G. Campbell, hereby responds to Petitioner's Motion for leave to submit new evidence in the above-entitled matter.

The Petitioner requests this Court to rule that he may submit a confidential memorandum dated September 6, 1986, from Jerry Campbell, Deputy Salt Lake County Attorney, to William R. Hyde, Chief Deputy of the Civil Division.

FACTS

In September of 1986, Jerry G. Campbell's immediate supervisor was Ralph Crockett who responded to the division chief, William R. Hyde (see attached affidavits of William R. Hyde and Jerry G. Campbell).

This inter-office memo was written prior to the notice of intent to terminate Ralph Tolman. The memo discussed the allegations and probabilities of success under the circumstances that existed in late August of 1986. The Memo was reviewed by William R. Hyde, Donald Sawaya, Chief Deputy of the Governmental Services Division, and Donald Harmon, Chief Agent in charge of the Investigative Division.

It was the opinion of Don Harmon, Bill Hyde and Don Sawaya that Ralph Tolman should be terminated from his employment with the Salt Lake County Attorney's Office and if the evidence did not sustain the termination before the Salt Lake County Career Service Council, the office would accept the results. Jerry Campbell did not have the authority to decide whether or not to terminate or recommend disciplinary action.

Subsequent to the memo of September 6, 1986, Jerry Campbell and Sam Dawson of the Investigative Division interviewed Margo Bergvall and Dave Nielsen concerning the allegation of assault and battery. At this interview, it was determined that an additional incident on June 11, 1986, had occurred. Said notice of intent to terminate was subsequently amended before the Salt Lake County Career Service Council (Transcript p.14, L.22-25; p.15, L.1-5, 19-25; p.19, L.1-3; p.33, L.21-23). The second incident on

June 11, 1986, occurred at approximately 8:00 a.m when Ralph Tolman was on his way to work. He forced entry into Margo Bergvall's house and proceeded to assault Dave Nielsen, said acts constituting elements of a burglary.

Subsequent to the Notice of Termination, William R. Hyde was appointed by the Salt Lake County Commission as Acting Salt Lake County Attorney (Transcript p.376, L.22-25; p.377, L.1-7). William R. Hyde reviewed the allegations of the Notice of Termination and had the authority to rescind or amend the disciplinary action. William Hyde concluded that there were sufficient allegations to proceed with the termination (Transcript p.381, L.2-11).

The confidential inter-office memo was written on September 6, 1986, and had no bearing on the decision of the Salt Lake County Career Service Council. Additionally, new information was discovered after its origination.

#### COUNTY PERSONNEL MANAGEMENT ACT

The Salt Lake County Career Service Council is an independent body created by the County Personnel Management Act, Section 17-33-1 et.seq., Utah Code Annotated 1953, as amended. §17-33-4 gives them the power to resolve all employee disputes. The Council is empowered to make "final, binding appeal decisions" to the Board of County Commissioners. The Council must render a decision based

upon the evidence before it and there is nothing contained in the record filed with this Court indicating they did otherwise.

The confidential inter-office memo discussing the points of termination, their strengths and weaknesses, written by an attorney who was not in a position to recommend disciplinary action is not relevant or material to the decision made by the Salt Lake County Career Service Council and said memo is governed by the Attorney Work Product rule.

DATED this 7 day of September, 1989.

DAVID E. YOCOM  
Salt Lake County Attorney

By Jerry G. Campbell  
JERRY G. CAMPBELL  
Deputy County Attorney

MAILING CERTIFICATE

I hereby certify that on this \_\_\_\_\_ day of September, 1989, a copy of the Memoranda in Opposition to Petitioner's Motion For Leave to Submit New Evidence was mailed, postage prepaid, to the following:

L. Zane Gill  
Attorney for Petitioner  
50 West Broadway, Suite 900  
Salt Lake City, Utah 84101

Denise Mendelkow

DAVID E. YOCOM  
Salt Lake County Attorney  
JERRY G. CAMPBELL (#0555)  
Deputy County Attorney  
2001 South State, #S3400  
Salt Lake City, Utah 84190  
Telephone: (801) 468-2653

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

RALPH TOLMAN,	)	
Petitioner,	)	AFFIDAVIT
vs.	)	
SALT LAKE CAREER SERVICE	)	Civil No. C-88-373
COUNCIL and SALT LAKE	)	
COUNTY ATTORNEY,	)	Judge Frank G. Noel
Respondents.	)	

---

STATE OF UTAH                    )  
                                      :ss  
County of Salt Lake            )

Affiant, WILLIAM R. HYDE, being duly sworn, deposes and states as follows:

1. That he is the Chief Deputy of the Civil Division, Salt Lake County Attorney's Office.

2. That in September of 1986, Jerry G. Campbell's immediate supervisor was Ralph Crockett.

3. That he was Ralph Crockett's immediate supervisor in September of 1986.

4. That on September 6, 1986, he received a confidential inter-office memo from Jerry G. Campbell,

Deputy County Attorney, regarding termination of Ralph Tolman. The memo analyzed the allegations and questioned whether termination would be sustainable. The memo was reviewed by Donald Sawaya, Chief Deputy of the Governmental Services Division, Donald Harmon, Chief Agent in charge of the Investigative Division, and your affiant. It was their decision and recommendation to the County Attorney that Ralph Tolman be terminated from his employment with the Salt Lake County Attorney's Office.

5. That Jerry G. Campbell did not have the authority to recommend termination or hiring of any individual.

6. That subsequent to the Notice of Termination, he was appointed Acting Salt Lake County Attorney with authority to rescind or amend the disciplinary action.

7. That your affiant reviewed the allegations of the Notice of Intent to Terminate and concluded that the circumstances of the allegations warranted termination of Ralph Tolman.

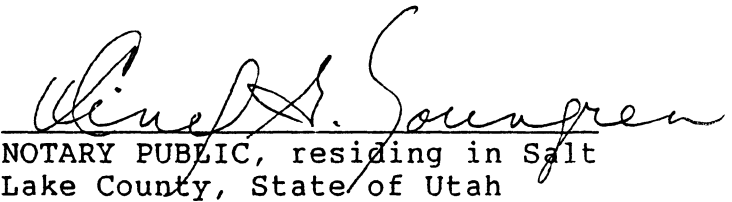
8. That the confidential memo was an analysis of pending litigation within the County Attorney's Office. Said memo was not authorized to be released nor was it written for publication.

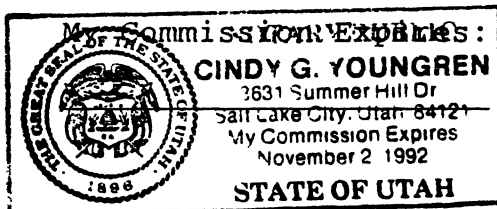


DATED this 1<sup>st</sup> day of September, 1989.

  
WILLIAM R. HYDE, Affiant

Subscribed and sworn to before me on this 1<sup>st</sup> day of  
September, 1989.

  
NOTARY PUBLIC, residing in Salt  
Lake County, State of Utah



C142+

DAVID E. YOCOM  
Salt Lake County Attorney  
JERRY G. CAMPBELL (#0555)  
Deputy County Attorney  
2001 South State, #S3400  
Salt Lake City, Utah 84190  
Telephone: (801) 468-2653

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

RALPH TOLMAN,	)	
Petitioner,	)	AFFIDAVIT
vs.	)	
SALT LAKE CAREER SERVICE	)	Civil No. C-88-373
COUNCIL and SALT LAKE	)	
COUNTY ATTORNEY,	)	Judge Frank G. Noel
Respondents.	)	

---

STATE OF UTAH                    )  
                                      :ss  
County of Salt Lake        )

Affiant, JERRY G. CAMPBELL, being duly sworn, deposes  
and states as follows:

1. That he is a Deputy Salt Lake County Attorney.
2. That during September of 1986, his immediate supervisor in the Civil Division was Ralph Crockett who responded to division chief, William R. Hyde..
3. That on September 6, 1986, he wrote a confidential inter-office memo to William R. Hyde regarding the termination of Ralph Tolman. The memo analyzed the

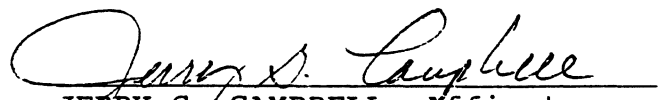
allegations and questioned whether termination would be sustainable.

4. That the memo was reviewed by William R. Hyde, Donald Sawaya, Chief Deputy of the Governmental Services Division, and Donald Harmon, Chief Agent in charge of the Investigative Division and it was their opinion and recommendation that Ralph Tolman be terminated from the Salt Lake County Attorney's office.


5. That he did not have the authority to recommend termination or hiring of any individual.

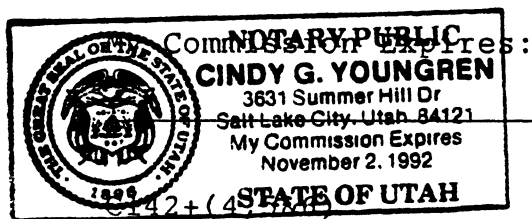
6. That the confidential memorandum dated September 6, 1986, to William R. Hyde, was not written for dissemination to any person other than those listed in this Affidavit. The memo prepared by your affiant analyzed the charges listed against Ralph Tolman and did not consider additional information discovered at a later date.

DATED this   1   day of September, 1989.

  
JERRY G. CAMPBELL, Affiant

Subscribed and sworn to before me on this 1<sup>st</sup> day of  
September, 1989.


  
NOTARY PUBLIC, residing in  
Salt Lake County, State of Utah



AFFIDAVIT OF SERVICE

STATE OF UTAH                    )  
  :  
County of Salt Lake        )

JERRY G. CAMPBELL, being duly sworn, states that he is the attorney for Respondent Salt Lake County Attorney and that he served four (4) copies of the Brief of Respondent Salt Lake County Attorney upon L. Zane Gill, Attorney for Appellant, 50 West Broadway, #900, Salt Lake City, Utah 84101, by delivering true copies thereof, on the 3rd day of August, 1990.

  
JERRY G. CAMPBELL  
Deputy County Attorney  
Attorney for Respondent

Subscribed and sworn to before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 1990.

\_\_\_\_\_  
NOTARY PUBLIC  
Residing in the State of Utah

My commission expires:

\_\_\_\_\_